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COASTAL ZONE
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can we keep public and private rights in balance?

LAND USE

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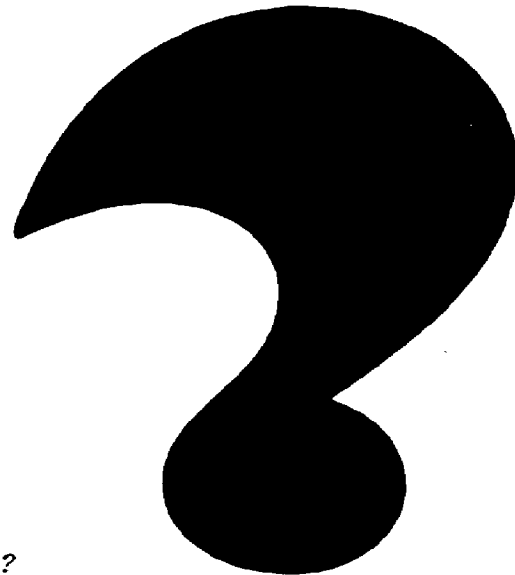
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- *why is everybody talking about land use?
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AND

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Introduction

Man's dependence on land is so basic a fact of life that every culture speaks to this intrinsic relationship.

. . . The Boganda of East Africa believe that spirits are associated with trees, pools, mountains and other natural phenomena. If a Bogandan alters the landscape or neglects a spirit's residence, he may be inviting illness or other misfortune.

. . . The Shinto religion of Japan regards the spirit of man as akin to the spirit of nature (equal, for example, to the spirit nature of pine trees, honey bees, and salmon). Believers express this kinship by relating construction closely to the natural site.

. . . In the Hopi Indian society, whatever land is strategic for survival is owned by the clan and is distributed on a temporary basis among clan members for their use. This land cannot be sold nor can it be inherited by individuals.

In the United States, a renewed concern with man's dependence on land is causing a major reappraisal of our attitudes toward it. For two hundred years an individual's freedom to use one's land as one wishes has been cherished as an implicit value of American life, though in actuality government controls have always made that freedom less than absolute.

As we changed in character from a predominantly rural to a predominantly urban nation and as once-plentiful land disappeared, concern over how we have used that land has mounted. Now, new voices are being heard, stating another view: that we must have more public control of land use, to protect vital resources and the well-being of all those who depend on the land. It's a view that reemphasizes values of interdependence and community. We are being reminded often, these days,

that *responsibility* for protecting the land and its resources goes alongside the *right* to own land. As the Senate Committee on Interior and Insular Affairs has said, "Land must be considered as more than a commodity to be bought, sold and consumed; rather it should be viewed as a finite resource to be husbanded."⁽¹⁾

In an ongoing debate across the country, we are beginning to reshape an ethic of land use. A multitude of proposals and techniques for controlling land use and development are under consideration, as citizens, planners, administrators, legislators, and executives explore alternative solutions to growth and land use problems. Congress has *considered* legislation to aid state land use planning and has *passed* environmental and coastal zone laws with land use components. A demand is emerging for a national growth or development policy to determine how large and in what directions our nation should grow.

To get a handle on the complex issues in land use requires some historical perspective on our changing attitudes toward land, as we evolved from an agrarian colonial society to a point where we face a future of coast-to-coast megalopoli—how we grew and where we are headed. It is against this backdrop that one must examine *the* most hotly debated land use topic—a direct consequence of our nation's rapid urbanization: Do we need to guide urban growth by controlling land use? If so, what tools are available in the governmental tool kit, and how might each of these tools—planning, regulation, purchase, taxation, and public expenditure—work?

But solutions aren't going to come in pre-packaged kits, however sophisticated. To limit and guide the use of land is necessarily to infringe on dearly-held private property rights. The toughest questions Americans have to answer lie in this sphere. At what point should the line be drawn between private rights in land and the

public interest? Are there overriding human concerns? Do the poor, minorities, and elderly require special attention in land use decisions? Even if we agree that our use of land should be better controlled, there are still hard choices to be made.

If government (at whatever level) steps into the land use picture, it has two basic options: to control the geographical land area itself or to control the uses that owners (whether private or governmental) make of the land they own. Beyond this fundamental choice lies a thicket of decisions to be worked out—where and how development should occur or, more specifically, which land areas and activities need oversight.

Even here, it's not just *what kind* of land use decisions that matters, but *who* decides and administers. Two other vital issues: *which level of government* (local, regional, state, or federal) might decide the nature of land use control and *by what means* (incentive or penalty). For example, higher levels of government may be better able than lower levels to consider regional, state, or national values in land use, but they are usually further removed from local citizen input. Yet citizen involvement in land use decisions and mechanisms to increase that involvement need to be encouraged, so that all those whose lives will be affected by change, not just those most narrowly involved, can be heard.

In short, a land ethic changes the role of Homo Sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.

**Aldo Leopold,
A SAND COUNTY ALMANAC. 1949. p. 204.**

Land use patterns

The past

How is it that we find ourselves, as a nation, at such a pass—so critically in need of sound, coherent policies and procedures and so far from possessing them? A look backward may shed some light.

From the very beginning of the nation, the federal government has been a powerful force in shaping our land use and development—sometimes directly, sometimes indirectly. Until the mid-nineteenth century, vast amounts of territory (roughly 76 percent of the U.S. mainland) became the property of the federal government through purchase, seizure, or annexation. According to Dr. Marion Clawson, a respected land use authority, "Perhaps never in history has so much valuable territory been acquired for so little money and so little blood. Within much less than a hundred years, an immense area containing some of the world's best farmland, many rich oil lands, and much mineral wealth was acquired for the people of the United States."⁽²⁾

Concurrent with the period of acquisition and continuing throughout the nineteenth century, the federal government acted as a conduit—acquiring and then dispersing land to private ownership through sale or grant. Despite often intense political differences over the nature of land disposal, the laws ultimately enacted were generous, requiring little or no payment and few improvements. Large land grants were made to states for public purposes such as schools and reclamation; other grants were made to encourage construction of railroads, canals and highways.

Under the aegis of such laws as the Northwest Ordinance of 1785, the Preemption Act of 1830, the Home-

stead Act of 1862 and the Desert Act of 1877, two-thirds of federally owned land passed into private ownership. Though marred by all too many instances of illegal claims, squatters and speculators, these laws and other federal decisions encouraged the uncontrolled growth and development which constituted, in effect if not by plan, our overall national land use policy.

A change in federal settlement and growth policies was signaled in 1872, when 1.9 million acres were set aside for federal reservation as the Yellowstone National Park. But not until 1891 was the first *system* of federal land reservation established under the Forest Reserve Act. Thereafter, remaining public lands were either administered by the federal government for grazing, mining, forestry, military and other purposes or were permanently reserved as national parks, wildlife refuges, wild and scenic rivers, natural forests, and Indian reservations. (3)

The present

The abundance and diversity of our domestic land resources are striking. U.S. topography ranges from mountains to swamps and broad rolling plains, the climate from arctic tundra conditions in northern Alaska to a tropical rain forest on Key West. Rich fertile soils, diverse mineral resources, and manifold varieties of native vegetation make up some of the most productive land in the world. In 1969, U.S. land use was distributed roughly this way: 32 percent forest and woodland, 27 percent pasture and grazing land, 21 percent crop land, 4 percent recreation and wildlife use, 4 percent urban and transportation use, and 12 percent miscellaneous (including marshes, sand dunes, bare rock areas, desert, tundra). (4)

To the question, Are we running out of land? the answer

is no. The United States possesses a very comfortable supply of land (11 acres per person in 1970). Although the world average is roughly the same, our land is far more productive than the average, with not more than 12 percent classed as having only slight value for surface development. In fact, sheer *quantity* of U.S. land is not yet so much a problem as is the *quality* of our land and the way we use it. Environmental degradation, social exclusion, and uneconomic, inefficient location of uses are increasing, particularly in urban areas. The quantity question is a longer-range issue—though not one that can be dismissed offhand. (5)

Spread city

While population *growth* is an important factor in our demands for land (the lowest of census projections is for 40 million more people by the year 2000), the more pressing problem is *population distribution*, our pattern of settlement. If the nineteenth century can be characterized as a period of westward settlement and expansion, the twentieth has been a time of rural to urban migration. (The Census Bureau defines "urban" to mean places of 2500 population or more.) In 1790, only 5 percent of the U.S. population was considered urban; by 1970, roughly 71 percent of the population lived in urban places—on two percent of the land surface. (6)

The United States grew from farm to small town to city to metropolitan area. Today, two metropolitan growth trends are taking place simultaneously: on a national scale, the overall proportion of people classified as metropolitan is increasing (between 1960 and 1970 the population of the United States grew 13 percent while the metropolitan population grew 23 percent); *within* each metropolitan area, the population density is dispersing as the land area for metropolitan purposes is expanding. Nearly

all metropolitan growth took place in the suburbs, while central cities have declined in population. For some time, the rate of expansion of the acreage of metropolitan settlement has actually been greater than the rate of population growth would alone justify. For one reason, rapid economic growth and technological developments have fostered urban geographical expansion. Everyone recognizes the reciprocal roles that the automobile and our extensive highway system have played in making Americans mobile and creating suburbia with its low-density settlement patterns.(7)

As metropolitan areas expand outward at relatively low densities, the "regional city," spread out and multi-nodal, is becoming the dominant American settlement pattern. Fragmented governmental jurisdictions can't handle economic, social, and environmental problems of regional scope. Simultaneously, as employment, shopping centers and wealthier residents move to the suburbs, central cities face grim problems—substandard, deteriorating housing; inadequate open space; high concentrations of air, water, and noise pollution; lack of mass transit; poor public facilities; a decreasing tax base; and a resultant concentration of the poor, the elderly, and minorities (more than four-fifths of all metropolitan blacks lived in central cities in 1970).(8)

The problems of sprawling, low-density suburbs are just as evident: monotonous, disorderly, inconvenient development patterns; galloping consumption of forests, farms, streams, swamps, open space, and scenic areas; lack of mass transportation for access to employment and other opportunities; high costs of public services such as electricity, sewerage, gas, phones, schools, fire, police. One of the suburbs' contradictions is the large proportion of idle land as developers "leapfrog" across vacant lots to build on the rural-suburban fringe. The con-

comitants of this dispersed life style are the lack of a sense of community and the loss of diversity. Meanwhile, the rural countryside recedes still farther out of reach.

While metropolitan areas grow, rural areas decline. A revolution in farm methods and decreasing employment in such industries as mining, fishing and forestry are major factors in the rural to urban migration that has occurred during this century. As rural employment opportunities and tax bases decrease, large areas of the nation lack adequate housing, roads, sewers and other basic public services. In 1970, more rural families (13.8 percent) than metropolitan families (7.9 percent) were below the official poverty level.(9)

The future

Urbanization isn't going to stop, at least not for the short-term, foreseeable future. Seventy-one percent of our population already resides in metropolitan areas; by the year 2000, 85 percent of our population is projected to be metropolitan, largely through natural increase rather than in-migration. Metropolitan concentration on a national scale and dispersion and expansion within metropolitan areas are expected to increase.(10)

The Commission on Population Growth and the American Future made these projections for the year 2000: approximately 20 million more acres will become urbanized (equivalent to the combined area of New Hampshire, Vermont, Massachusetts, and Rhode Island). Several metropolitan areas and intervening counties will become a series of continuous zones, termed urban regions, within which one is never far from a city. Much farm and rural land near cities will have disappeared, and many areas now considered remote from cities will be home to commuters. Second homes will become more common, and many resort areas will be subdivided and suburban-

ized into large-size lots. More people with more money will increase the use of land for outdoor recreation and second homes, with resultant higher energy consumption and increased impact on the natural environment. (11)

Limits on energy consumption may, paradoxically, give cities and suburbs a chance to revitalize themselves—to become economically viable, compact, multipurpose—in short, livable. Energy problems may well reverse the flow to the suburbs. With increased fuel costs, both businesses and households may begin to seek in-town sites, close to the central business district and mass transit. Rail access is now becoming an important criterion for development. A combination of land use planning and control could encourage this trend and reduce the enormous energy consumption associated with urban sprawl.

As we move toward the more intensive and multipurpose use of land which a growing population will dictate, land uses within urban areas will increasingly impinge on one another. According to the estimates for the year 2000 by Resources for the Future, Inc., if present trends were to continue, land demands for all uses (crop land, forest, grazing and pasture land, recreation, and urban uses) would add up to 50 million more acres than the country has. At present, the considerable acreage of land classified as pasture and crop land constitute a "bank" of open space; as we grow, these lands will be taken out of the bank and developed. Thus, conflicts between the pressure to preserve land for open space and wilderness uses and the pressure to develop land are expected to intensify, and the overall supply of land for all uses will become a more urgent problem. (12)

The growth debate

The "growth or no-growth" debate is emerging as one of the major issues of the last quarter of the twentieth cen-

tury—perhaps *the* major issue. According to the Task Force on Land Use and Urban Growth, "A rising emphasis on human values, on the preservation of natural and cultural characteristics that make for a humanly satisfying living environment" has led an increasing number of citizens to challenge growth as an end in itself. (13)

Doubters of the "growth is good" maxim, which has guided the United States until recently, believe that rapid population and economic growth is neither necessarily good nor inevitable. They blame growth for many of our current ills—the deterioration of the environment . . . unacceptable air and water pollution . . . less access to open space and recreation . . . higher levels of noise and congestion . . . loss of a sense of order, cleanliness, and visual harmony. Critics often argue that indiscriminate development destroys the sense of community. They underscore the inconvenience and isolation of life in "spread city," where home is separated from shopping, offices, schools, and open space. Not only is growth seen as a serious threat to the natural environment and to the quality of life, growth is also perceived by those who question it as stimulating higher costs of public services and therefore higher taxes.

The band of doubters grows daily. Evidence of the search by suburban citizens and communities for ways to limit or guide growth are everywhere: for example, moratoriums on water, sewer, and building permits; population limits; timed development ordinances; large-lot rural zoning; building height limits; public acquisition of private land, preferential or deferred taxing systems.

Growth proponents contend that halting growth is not practical or even possible. If growth is restricted, they argue, our needs for beneficial economic development, energy, natural resources, food and housing will be ignored. Between now and the end of the century, the

United States will have at least 40 million more people. Where will they live and work, if growth is limited? Can the freedom to live where one chooses be denied? Mobility is a key to improving one's economic position.

In addition, today's housing supply doesn't even meet the needs of *today's* population. According to projections made by the National Commission on Urban Problems, 4.2 million new and rehabilitated low- and moderate-income homes need to be built within the next five years, not to mention the need to improve substandard housing. (14) Where are the 40 million more going to be housed?

Some critics believe that anti-growth philosophies are prompted by exclusionary motives. They point out that no-growth in one area inevitably means growth elsewhere, if room is to be made for more people, and they note that many people who object vehemently if growth takes place in *their* neighborhood say very little if growth takes place elsewhere. Since growth may be desirable for those groups in society whose share in our present material wealth is small, many minorities read "no-growth" as code language for "keep out."

Some argue that the real problem is not *population growth* but our profligate levels of consumption or *economic growth*. Higher incomes create higher demands for the use of land—larger homes, second homes, travel and recreation, shopping centers, power plants, and so forth. The solution, they say, is to institute a new value system predicated on restraint and reduced expectations.

Still others contend that the "growth versus no-growth" debate is not an either-or issue. They believe that development should not be stopped but managed. Growth which provides the necessities of life (food, clothing, shelter) need not produce dismal consequences if it is guided by concern for a desirable quality of life.

The Task Force on Land Use and Urban Growth de-

clared that no-growth is not a viable option for the country in the remainder of the century: the urban region and future population growth are facts of life. "The issue is not whether there will be urban regions . . . but what form these urban areas will take." For example, our population can grow and still occupy the same space at higher densities. The system must be rearranged and redesigned to guide urban development rather than prohibit it. (15) In the past, economic growth and development have been associated with prosperity, opportunity and social progress. If the adverse effects of growth can be minimized, growth may actually help to achieve a better quality of life—by developing new technologies to clean up pollution, for example, by building new communities, and by providing jobs for the unemployed.

Land use and government

How have governments in the United States responded to growth and land use problems? What governmental tools are available to regulate or influence land use?

Today, about a third of our land is directly owned and managed by the federal government. Almost all of the remaining two-thirds of our land is privately-owned. However, government at all levels—federal, state, and local—can and does influence the use of private land, both directly and indirectly.

Land use planning

Before a government can correctly prescribe uses to which a particular parcel of land can be put, it should have an overall plan, or a description of how goals are to be achieved over a stated period of time, based on a study of resources, needs, and potentials of an area. *Comprehensive land use planning* is therefore a basic governmental activity, which can prevent inefficient and inequitable use of land resources, if carefully coupled

with legal authority to implement the plan and thereby control land use.

The justification for land use planning goes this way: In a free enterprise society, the development of land often has hidden costs which are not completely reflected by the market pricing system. While the private owner does pay the costs of acquiring and developing land, other costs stemming from the owner's decisions are borne by other people. For instance, the costs of water pollution or of cleaning up water pollution, the costs of traffic congestion or of controlling or reducing it, the costs of crowded schools or of improving schools are very often borne not by the person who profits from the land use choice but by neighbors or by a later generation. The market system is imperfect because private owners may not want to pay the additional costs, lack complete knowledge, or work in a noncompetitive situation. Land use planning supplements the market pricing system by considering public as well as private costs and needs.⁽¹⁶⁾

At the same time, it has been argued that a single developer cannot be responsible for all the costs inherent in land development. Pollution costs are cumulative, while standards may be new. And development can produce benefits, too, by providing new housing and employment opportunities, for instance.

Tools for implementation

The police power The police power is the inherent power of government to exercise reasonable control over persons and property in the interest of the general security, health, safety, morals and welfare. When a government directly regulates or controls private land without monetary compensation—by zoning and subdivision regulations, health and building codes, for example—it is exercising its police power. This power resides with the states, according to the 10th Amendment of the U.S. Constitu-

tion, which declares, "The powers not delegated to the United States . . . nor prohibited to the States, are reserved to the States. . . ." But the states, traditionally regarding land use as a local matter, have delegated much of this power and responsibility to local governments. Few states have established even minimum standards. Of some 60,000 local jurisdictions authorized to zone, only about 10,000 have actually exercised the power, and among these the effectiveness varies widely.⁽¹⁴⁾ The upshot is that the police power, which in theory is the most direct mechanism for land use control that governments have, has to date been underused and therefore less potent in practice than other government tools.

Disenchantment with the system of local zoning is becoming pervasive. Because the scope of regulation has been no wider than the community's boundaries, a multiplicity of jurisdictions has fragmented decision making in metropolitan areas. By attempting to protect neighborhood character and private property values, zoning has prevented innovative patterns of development and low-cost housing for the poor. In practice, zoning has not encouraged planning for the long term, guiding new suburban development, protecting agricultural or recreational land, and providing low-income housing sites. On the positive side, zoning has preserved the quality and value of some established areas by protecting neighborhoods from incompatible uses without resorting to large-scale public acquisition of land.

Eminent domain Governments also have the power of eminent domain, the power to condemn and purchase private land for public purposes, such as highways or parks. The sheer monetary burden of outright purchase makes widespread use of this power by local and state governments impractical. To date, the federal urban renewal program is the largest public effort to acquire urban

land for redevelopment. Other examples of the use of eminent domain authority (and public expenditure) include highway programs, land banking, purchase of land for public parks, and large-scale land assembly for the construction of new towns. The New York State Urban Development Corporation, a statewide governmental agency, is exercising its power of eminent domain in order to develop low-income housing, inner-city areas, and new communities.

Taxation Taxation is another important power. In fact, the property tax is often cited as a chief cause of distortion in land use patterns. Because local governments rely so heavily on the property tax for revenues, communities have, in effect, practiced "fiscal zoning," that is, zoning land for uses that will produce high revenues (industrial, commercial or high-income residential uses) rather than low revenues (such as low-income housing and open space). In addition, administration of the property tax—through inequitable and uncoordinated practices at the local level—tends to cause speculation and premature, sprawling development in the suburbs (such as conversion of farmland to subdivisions, strip development along highways) and more rapid abandonment and deterioration of housing in the cities. Among remedies that have been advanced are

- ☐ shifting property tax administration to the state level,
- ☐ taxing land alone rather than improvements and buildings on the land (such as a site value tax), and
- ☐ taxing certain uses (such as agriculture) preferentially.

For the role of the federal income tax, see the section, "The federal role."

Public expenditure Zoning, of whatever kind, has in practice exerted less influence on land use patterns than has the power to spend public monies. By providing or extending services, subsidizing private activities through grant-in-aid programs and loan guarantees, and selectively locating major installations, government at all levels has affected land use decisions and values. The location and design of water and sewer lines, airports and highways, for example, can spur intense land development by providing access to an otherwise quiet rural community. Recently, the idea of public recoupment of private speculative gains in land value created by expenditure of public monies (often referred to as the "unearned increment") has been receiving increased attention.

To sum up, a combination of tools is needed, because no single governmental tool can effectively guide land use by itself. Of all the governmental powers available to influence or control land use, whether positive or negative, the powers of public expenditure and taxation have so far had by far the greatest effect; the police power to regulate (zone) and the power to purchase land have, to date, been used cautiously, with varying effects. The latter two powers could, however, become more effective tools in the future. Although widely acknowledged as necessary, the conscious, successful *coordination* of these four powers with the overall practice of planning (resulting in implementation of plans) has yet to be realized. (14) ☐

What kinds of land use decisions?

The public good v. private rights

The Fifth Amendment to the U.S. Constitution guarantees that private property cannot be *taken* or regulated for public use without just monetary compensation. But determining exactly when land use regulation constitutes a *taking* is left to the courts to resolve on a case-by-case basis. In general, courts have upheld land use controls without compensation so long as the "health, safety, and general welfare of the community" is at stake and so long as the owner is not inhibited from making "reasonable use" of his property. On the basis of these conditions, courts must decide whether the restriction is a *taking* for which the owner should receive the fair market value of the property.

The question of how far any government can go in limiting development—or, in other words, of when a restriction becomes a *taking*—is still unsettled legally. All government regulation of land use through the police power impinges on private property rights by limiting a landowner's freedom to do with his property as he pleases. The running debate focuses on where to draw the line between the public interest and private rights.(17)

Urging the need for a new land ethic, the renowned conservationist, Aldo Leopold, wrote that man must recognize his dependence on land, using it as a common resource rather than a private possession.(18) The simple rubric to view land as a precious community resource rather than as private capital has, however, run headfirst into some long-held assumptions: the right to do with one's property as one wishes . . . the freedom of mobility

. . . the right to monetary compensation for public restrictions on private property . . . even the right of self-determination. These premises stem from the concept of fee-simple ownership, which was espoused in the United States in reaction to European monarchical traditions. Opponents of strong land use regulations decry erosion of private property rights and enlargement of government control. They believe that land use regulation is a power inconsistent with capitalism and a free society—that a fundamental interdependence exists between the personal right to liberty and the personal right to property. To the rights guaranteed by the Declaration of Independence—"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"—many state constitutions added, "the right of acquiring, possessing, and protecting property." (19)

Advocates of stronger public controls recognize that the just compensation entailed in bringing lands under public control through purchase would be prohibitively expensive. They argue that there are, nonetheless, legitimate restraints on the concept of private control of land. They believe that in some situations the public good transcends the private right to sell or to lease for whatever use will bring the owner the maximum amount of money. They say that development is as much a privilege as a right, that if development is indeed a private right, then some public obligations go along with that right.

The Task Force on Land Use and Urban Growth urged that the Supreme Court take a broader position on the interpretation of the Fifth Amendment and extend the scope of the police power in order to meet the needs of the future. They argue that rights to develop private property result from and, in turn, influence the actions of so-

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ciety (as in the construction of public facilities) and should therefore rest with the community rather than with property owners. They also note that the United States has always had public controls. Although the attempt by King George in 1763 to forbid westward settlement beyond the Appalachian Mountains was one of the motives for the American Revolution, the thirteen original colonies and, later, states imposed strict controls on street design and layout and on iron mills, factories, and the like. Courts later used the nuisance doctrine to uphold such restrictions.(20)

In Great Britain, development rights are seen as created and allocated to the land by society rather than by the property owner. There a developer must pay a "betterment levy" if he gets permission to develop his land. The British Town and Country Planning Act of 1947 (now slightly modified) declared that "ownership of land, generally speaking, carries with it no more than a bare right to go on using it for its existing purposes. The owner has no right to develop it, that is to say, he has no right to build upon it and no right even to change its use, and if he sells it he can expect to get only its existing use value because whatever development value the land had is now expropriated by the state."(21)

Because the relationship between land and income is so complex and interwoven, the issue of *taking* land through the regulatory process is a serious one, far from easy to resolve. Owners often base their own economic security on the expectation of "unearned increments." Pensioners and retired persons who have invested their life savings in land, farmers who depend on land for their livelihood could suffer economic hardship if the rules of the game were to be abruptly changed. What would happen to the economically disadvantaged, the elderly, the poor, the minorities, if land use restriction caused high rents, smaller incomes, or a depressed supply of homes? On the other hand, is it fair that an individual landowner realize enormous profit from the extension of a highway—a public facility paid for by the taxpayer?

Those who take the middle ground want land treated as *both* a resource and a commodity. The right to move throughout the country freely (known legally as the "right to travel"), the rights of all persons to homes and jobs (which are in turn tied to the free availability of land), and the need to conserve a finite supply of land must be considered. Weight must be given not only to the question "Will this use reduce the value of an owner's land?" but also "Will this make the best use of land resources?"

One proposed concept for controlling land use, which respects private investment in land and at the same time allocates land use in the public interest, is that of *transferable development rights*. In essence, it means that if a government were to prohibit development in an environmentally sensitive zone, it would allow an owner to transfer his frozen development potential to a more appropriate district. Up to the present, however, there has been little actual experience with development rights.

As American attitudes and values toward land are challenged, citizens must face these issues: Is the right to

own and develop land an inalienable right? Or should land be viewed as a scarce public resource and/or as a commodity, that is, as private capital? Does private ownership in land imply social obligations? Who should benefit when public expenditures increase private land values—a few owners or the public? How can private property rights be balanced with public rights in land?

Exclusionary patterns

Another fundamental issue is how to ensure that land use decisions are fair and unbiased toward the poor, the elderly, and minorities. The country is already stratified along income and race lines; at the same time its population patterns are more and more geographically discriminatory.

The poor, the elderly, minorities and the unemployed are concentrated—partly as a result of government policies, in rural areas and in the center city. Census data confirm what any observer can see with a discerning eye. During the 1960s, the black population of center cities grew by 3.2 million while the white population declined by 600,000. In 1970, more than four-fifths of all metropolitan blacks lived in the central city. The proportion of American families in the center city with incomes below the official poverty level, already high in 1960 (61.3%) rose to 63.1% in 1970.(22)

These center city and rural dwellers tend to be disadvantaged in terms of housing, education, transportation, and public services generally. Suburban residents, on the other hand, are usually white, affluent, and able to take advantage of housing, employment and educational opportunities.

What are the causes of exclusionary population patterns? Racial discrimination, inadequate training, and poor public services certainly help to perpetuate poverty

in urban and rural areas, but location and types of jobs and housing available to the poor are also factors. As jobs and vital tax revenues move to the suburbs, exclusionary land use mechanisms such as low density (through high minimum setback, building and lot requirements) zoning, sewer or building moratoriums, population limits, and inadequate transportation lock the poor, the less affluent, and minorities out of the suburbs. Combined with skyrocketing costs of land, labor, and building materials and rising property taxes, the problem is worsening.

While communities continue to depend heavily on property taxes, they have strong incentives to exclude problems by zoning them away. The need for revenue favors small, rich families over large, low-income families, and even young marrieds, the elderly, and public service employees such as school teachers, firemen and policemen are hard pressed to find adequate housing within their budgets.

The rural poor are also affected by land use decisions. In 1970, almost 60 percent of all substandard housing was in rural areas, which housed only one-third of the nation's population. Over three-quarters of these homes lacked piped water, a flush toilet, or a bathtub or shower. Employment is hard to find and a declining tax base does not provide adequate education, medical or housing services or the funds to cope with water pollution.(23)

Equitable land use decisions should enable all segments of the population to enjoy and share in beneficial living, working, and recreation environments and to choose from a variety of living patterns. The courts have struck down racially motivated exclusionary land use regulations when the "right to travel" (or freedom of choice) or the "equal protection" clause of the 14th Amendment is violated. In a test case, a U.S. district

court judge ruled that an ordinance limiting population growth in Petaluma, California was unconstitutional. The ordinance would have allowed extending water services for only 500 new units a year. In addition, moratoriums to extend sewer services have been judged exclusionary when it has been established that a community had an opportunity to upgrade sewage treatment capacity but ignored the opportunity.

Solutions that have been advanced to achieve equality of choice for all include

- ☐ free or low-cost mass transportation to jobs;
- ☐ requirements and incentives (such as density bonuses, permit quotas) for developers to include low-income housing in their developments;
- ☐ combining low-income housing with suburban employment centers such as industrial parks;
- ☐ priority attention to improvement of the center city environment;
- ☐ redirection of economic growth to the city;
- ☐ attachment of public housing referenda to open space referenda;
- ☐ regulation of land and property taxation by higher levels of government;
- ☐ a shift from the property tax to income taxes at the local government level; and
- ☐ land banking for subsidized housing.

However, local dependence on property taxes for revenues and the desire to protect private property values are built into our institutions. But more and more are asking: If land use decisions need to be balanced, should not the needs of all segments of the population, particularly the poor, the minorities, the elderly, and the young be taken into account?

Where and how should development occur?

If more public control over private property rights is necessary or exclusionary land use practices must be stopped, there are further questions:

Are there certain kinds of land uses of significant concern to the public?

If there are, what kinds of land areas and activities should be controlled?

Which uses are of local concern? regional concern? statewide concern? national concern?

The answers vary from region to region and from state to state. For example, in developing our land use patterns we have paid little attention to the suitability of land for different purposes. Or, put another way, we need to know the *carrying capacity* of land (the intensity of use which, if exceeded, will cause adverse environmental consequences) in order to establish relative land use priorities.

If land is to be assessed on the basis of its carrying capacity, then an area's natural carrying capacity has to be determined, so that the community can project the adverse consequences of exceeding that capacity and consider whether the costs exceed the anticipated benefits. For example, soil has a limited natural capacity to treat human waste from septic tanks. If development is permitted on the basis of using septic tanks but in reality exceeds the natural capacity of the soil, then sewage treatment plants have to be constructed in order to avoid pollution. Society—governments—should be able to forecast the costs of these consequences and measure them against the benefits of development. The carrying capacity of such other natural phenomena as aquifers,

hillsides, soils and vegetative cover needs also to be considered.

Certain land areas (based on character and quantity) and activities (based on size and kind) are frequently mentioned as requiring special regulation.

Critical areas:

fragile or historic lands, where development could result in irreversible damage (such as shorelands of rivers, lakes, and streams; estuaries and bays; rare or valuable ecosystems and geological formations; significant wildlife habitats; unique scenic or historic areas; wetlands)

renewable resource lands, where development could result in the loss of productivity (such as watershed, aquifers and aquifer recharge areas, significant agricultural and grazing lands, forest lands)

natural hazard lands, where development could endanger life and property (such as floodplains, areas with high seismic or volcanic activity, areas of unstable geologic, ice, or snow formations).

Critical activities:

public facilities and developments, which may stimulate secondary land use demands and need to be sited with this possibility in mind (such as airports, highway interchanges, power plants, water and sewer utilities, waste disposal facilities)

private development, which may have substantial impact on the physical, social, and economic environments of a large-scale area (such as industrial parks, subdivisions, new communities, shopping centers, rural land sales and development projects)

regionally beneficial activities, which need positive requirements for such services as low- and moderate-cost housing and energy, recreational and other facilities

wherever exclusionary local land use policies adversely affect the physical, economic, or social well-being of a region.

Can a balance be found?

Land use is often viewed as the common base for resolving our environmental, economic and social problems. The location of housing, employment, energy facilities, highways, parks—all concern the use of our land. The uses to which land is put influence the pace and character of economic growth, the severity of social problems, and the quality of the environment.

Where so many diverse interests collide (development versus preservation, private versus public rights, the needs of disadvantaged persons versus the needs of the advantaged), reaching an equitable balance in land use decisions may be a herculean task.

However, present urban and rural land use trends are increasingly seen to be environmentally and socially deleterious. There is also growing awareness that protection of the private property rights of some has resulted in the restriction of the right of the community as a whole to enjoy a quality living environment. As "spread city" grows, inner-city deterioration, imbalanced housing and employment patterns, traffic congestion, and inadequate open space deny personal freedoms, environmental quality and social equality.

Americans seem to be searching for communities that are livable. This outline of the components for a balanced, livable community suggests the kinds of yardsticks we might apply in that search:

- ☐ social, recreational, ecological, aesthetic and safety factors
- ☐ location near employment centers with convenient,

inexpensive, and efficient transportation

- ☐ adequate educational facilities
- ☐ provision of public services on an equal basis
- ☐ easy access to commercial areas
- ☐ the right to live in the type of housing desired, without unreasonable restrictions
- ☐ equality of opportunity for all income levels and races. (24)

In the end, our land use problems would seem to have more to do with quality of life than with sheer numbers. If the health, comfort, and happiness of the whole community are fundamental goals, then perhaps it is time for a new emphasis on a quality living environment *for all*, time to interpret the public interest more broadly, time for more government involvement in land use. We need land use standards for tomorrow that embody relevant environmental and social objectives, as well as an equitable balancing of the public interest against private rights. All land use controls should be examined for compatible environmental and social goals. For example, it is fair to ask: Does this ordinance foster an integrated or segregated society? Do environmental standards adequately protect innercity residents and the rural poor?

Government should ensure that land use decision making weighs and balances competing environmental, economic and social requirements and values. It should develop open and orderly land use procedures that would encourage well reasoned and knowledgeable decisions and avoid haphazard, precipitous development that ends up with homes, jobs, services and open space out of reach of one another.

Can we, citizens and government together, meet the challenge of establishing land use policies and procedures and build livable communities for all Americans?

Who should make land use decisions?

Growing disillusion about local control over land use in general and zoning in particular has stimulated interest in moving responsibility for land to higher levels of government. The argument is based on the fact that, depending on the nature of the land and the proposed use, there is more than one public interest in land. A land use decision could involve the interest of adjoining neighbors, the interest of the whole local community, a regional interest, a statewide interest, or even a national interest. The *kinds* of land use decisions ultimately made are tied to *who* makes, administers, and enforces the decisions. Whether the public interest is adequately considered depends quite often on which level of government has responsibility and through what means (incentives or penalties) decisions are implemented.

History has blurred the once distinct roles of local, state, and federal governments in land use. For example, as our towns and cities grew, the effects of land use decisions spilled over precisely defined jurisdictional boundaries. As noted at the beginning, the states are the ultimate legal source of the power to regulate land use. Historically, however, the states have delegated this power to localities and have exercised little or no direct oversight. But, in light of the inadequacies of local zoning and the reluctance or inability of many localities to tackle land use problems, proposals have been advanced to strengthen the role of the state in land use. Other proposals delineate regional and federal roles in land use.

Any realignment of roles will be controversial. Tradi-

tions of local home rule, the protection of private property rights, and opportunities for local citizen input are at stake. Yet, given the generally acknowledged poor performance of local governments with present land use control mechanisms, a realignment of government responsibilities may be the only solution. The crucial questions at the forefront of the land use debate are:

Should the control of land, which up to now has been delegated almost exclusively to local government, be exercised under limited, selected conditions, by higher levels of government?

If so, *by whom, to what extent, and by what means?* For example, should the means be the setting of minimum levels of performance? Should the means be exercise of direct control?

It has been said that the federal government has the corner on the money, the states have a corner on legal authority, and local governments a corner on the problems. To date, all three levels have been reluctant to exercise control over land, yet all three have the potential to influence the way we live in the future.

What are possible arrangements for exercising land use control at each level of government?

What are the pros and cons for each?

The state role

The most widely discussed solution is a stronger state involvement in local land use decision making. Interest in the state role is not new. An attempt in the 1930s to build up state planning agencies dissolved. Nevertheless, states are said to have great potential. They may be able to guide growth more effectively and equitably than local

communities have done because they have wider oversight, they control major public works programs (such as interstate highways), and they have the inherent power to regulate land use. Because so much of urban development takes place in the suburban-rural interface where local land use controls are often nonexistent or weak, the state may be able to play a critical role in controlling and planning these areas. States may also be able to solve environmental and social problems of regional and statewide scope by considering the interest of citizens who live outside a locality but are affected by that locality's actions. And states can overcome local officials' vulnerability to local pressures by strengthening regional decision making. States might also coordinate land regulation and taxation and adopt and administer standards for new town development.

Congressional proposals

Congress seems to look kindly on enhancing the state role. In the last several years Congress has been moving toward enactment of the national Land Use Policy and Planning Assistance Act. Though no bill has been passed and signed into law, the general thrust of S.268, passed in the Senate in 1973, is to provide federal financial assistance to encourage state planning and control over land use of clearly "more than local concern," not to establish federal planning or zoning. Assuming that states will differ in their approaches, federal review of state land use programs would focus not on their substance but on whether the state is making "good faith" efforts to develop and implement its program. States would have wide latitude in determining how much or what specific land should be controlled and by whom.

S.268 included these features, as well: To qualify for federal assistance, states would be required to develop

within three years a planning process for identifying areas of critical environmental concern, key facilities, large-scale private development, regionally beneficial development, and rural land sales projects. Within five years states are expected to exercise control over these critical areas and activities of more than local concern, by using either or both of two methods: *direct state control* of or *state review* of local decisions according to state-established standards. A basic concept of the legislation is that decisions should be made at a level of government where all those affected would have a meaningful opportunity to participate in the decision-making process. (25)

The ALI model code

The proposed legislation was influenced by a Model Land Development Code which the American Law Institute (ALI) has been drafting for several years. The code allows cities and counties to retain the initial power to regulate land development. A local "land development agency" would use a development ordinance, development permits, and various categories of development plans as tools for regulation. Development is broadly defined under the code to include almost every alteration of physical space such as subdividing, clearing, building, and polluting.

Most development decisions would continue to be the primary concern of local governments. The state planning agency would formulate a state land development plan and establish minimum rules and standards for implementing local plans. The state could designate and regulate land use in "areas of critical concern" and "uses of regional impact." A key principle of the code is that the state play a role in "big cases," only those having regional or statewide impact by virtue of their location,

type or magnitude—roughly estimated as no more than 10% of all land use decisions within a state. (26)

The "Quiet Revolution"

Some states aren't waiting for a national law. They are already moving on their own toward stronger land use controls. Within the last five years, at least twenty state legislatures have passed state land use control measures. Others are heatedly debating proposals that if defeated are certain to be reintroduced the following year.

The state of Hawaii began what has come to be known as "the Quiet Revolution." In 1961 it passed a land use law designed to reconcile three basic goals: 1) to preserve prime agricultural land, 2) to encourage tourist-oriented development without disturbing the attractions of the natural landscape, and 3) to provide compact urban areas where people can live at reasonable cost. A state commission was set up to administer the division of all the land in the state into one of four districts—conservation, agricultural, rural, and urban. The Hawaiian commission in effect limits urban growth by drawing the boundaries of the urban districts. Only land so zoned is available for an intensive form of development, based on a ten-year estimate of future needs. (27)

The scope of the states' land use programs ranges from comprehensive land use management programs to controls limited to a few specific areas or activities. Vermont's program, like Hawaii's, is an example of statewide *comprehensive land management*. Vermont's 1970 act confers upon the State Environmental Board and district environmental commissions the power to establish comprehensive state capability, development and land use plans and to pass on all major proposals for development throughout the state. The state plan is to be developed in a three-stage process, with interim regula-

tion through a state permit system based on 10 statutory criteria. While this type of approach does not involve the state in all land use decisions, the state program will be based on a long-range, comprehensive land resource plan, with implementation of land regulations undertaken by the state in a joint arrangement with regional commissions.

A second approach and one of the most popular is state management of *areas of critical concern and activities of regional impact*. A Massachusetts law permitting override of local zoning codes to achieve dispersion of low-income housing is an instance. It regulates housing development on the grounds that placement of low-cost housing has regional impact: one community's high-cost housing enclave forces neighboring communities to meet the housing needs of the poor. The California Coastal Zone Conservation Commission regulates through an interim permit system all development in the coastal zone until a state coastal plan is prepared. Under a 1971 act, Delaware bans all new heavy industry from the coastal zone to provide for recreational use and tourism. Wisconsin regulates development around its many lakes and waterways in order to preserve water quality. A number of states are setting up several separate programs to deal with limited areas and activities, which could ultimately be combined into comprehensive programs.

In some cases, states have taken over the *management of land in uncontrolled areas* when local governments fail to exercise delegated responsibilities. When zoning or subdivision controls are lacking, states have created and enforced a set of minimum state standards for uncontrolled or undercontrolled areas, until the locality adopts regulatory legislation of its own. Oregon, Vermont, and Maine use this approach.

The degree of direct state involvement in land use also

varies widely. No state completely controls land use. Rather, states can be placed on a continuum of balance between total state control and total local control. Hawaii, Vermont, and Maine could be classed as having a greater degree of state control by imposing initial state standards. The ALI Code and the state of Florida utilize more local control: local governments make the initial regulatory decisions in critical areas, with state modification of local plans and regulations allowed only after a period of time. States also vary widely in their choice of a state administrative agency. Some use an agency in the Governor's office or a line agency in the Executive Branch, others have created an independent commission, and still others use state-created regional commissions.

State experience with direct land use control is relatively new, and most agree that it is too soon to judge which methods are most effective. In addition, because widely varying regional conditions, critical problems, and political traditions exist, one state system may not be appropriate for another state.

The local role

There is no guarantee that shifting authority for land use regulation to a higher level will result in any better protection than can be provided by local officials. (Former Mayor Robert Knecht of Boulder, Colorado, in testimony before the Senate Committee on Interior and Insular Affairs, 1972.)

Support for local zoning as a principle is stronger than that for state-administered land use regulation, but Vermonters would willingly divest communities of zoning powers if they felt that local officials wouldn't enforce these regulations rigorously. (Vermonters on Vermont, 1972, page 2.)

These two statements reflect local attitudes toward

Prerequisites for a successful state land use program

States are short on experience in land use control. Moreover, their needs and their programs vary. Certain general prerequisites are necessary if a state land use program is to be successful:

Adequate funding Effectively involving the state in land use management is expensive. Costs for staff, research, public meetings, publications and so forth are essential for a strong state role.

Citizen support Although geographic distance makes local citizen participation difficult, citizens throughout the state must demonstrate support for state legislation, policies, plans, and decisions. States must establish processes to inform and involve citizens in all phases of the development and implementation of land use programs through hearings, meetings, advisory boards, and so forth.

Administrative coordination If a state bypasses the existing system of local regulation when it sets up a state administrative system, the end product is two duplicating or overlapping systems, often doubling the time required and increasing the costs of development and administration. A single system with specific roles for each cuts costs and is more efficient. Disputed decisions could be appealed to an administrative or judicial body. States also need to coordinate separate programs, such as air and water pollution control and highway construction, at the state level.

Adequate data base Data on land resources, population growth, and so forth are necessary to provide a sound basis for decision making and to legally justify state intervention in decisions of more than local concern. Such a data base can be extremely valuable in preparing environmental impact statements.

Local participation Local governments should be encouraged to exercise land controls wherever possible, and such processes as advisory boards should be set up to encourage maximum local input into state decisions.

Planning and regulation At any level of government, the planning process (evaluating alternative uses against overall goals and policies) and regulation (implementing plans) must be coordinated. One without the other will result in ineffective decision making.

Technical assistance Because local governments will still be responsible for the majority of day-to-day decisions, the capacity of localities to plan and control land use must be strengthened. Localities need technical advice, financial assistance, and legal authority to use innovative methods (such as land banking and transfer of development rights) to upgrade the quality of land use decisions.

Utilization of existing state authority Current state authority over construction and grant-in-aid programs such as highways and sewage-treatment facilities can stimulate more effective land planning and control.

state land use control, the second indicating a modest crack in the dike of public opinion that has traditionally favored local autonomy. Persistently and often successfully, localities have resisted legislative attempts to impose state controls.

The local-state land control dilemma is illustrated in a vote taken by the Denver city council. In May of 1973 it unanimously endorsed the "goals and principles of state land use control legislation." In an equally unanimous vote it rejected the provisions of the bill as being unrealistic and as an infringement on local rights.

The tradition of home rule is strong in this country. So, too, is uneasiness with a strong central government. A 1970 Oregon survey of citizen attitudes showed that residents believed, by a 5-4 ratio, that local government was doing only a fair to poor job in land use planning and control. Yet seven out of ten citizens wanted that power left at the local level. Many arguments are advanced for retaining the power for land use regulation in local hands:

- ☐ Local officials know community needs better and are committed to meeting them.
- ☐ Local government is more directly in the public eye than the state government; therefore, local government can provide better protection for the public interest.
- ☐ Because state planning officials and members of state commissions are generally appointed, they are further insulated from the voter. If locally elected officials are unresponsive, they can be voted out of office.
- ☐ Traditionally, rural-suburban majorities in state legislatures have neglected social problems and problems of the city. To date, state governments have unimpressive records for devising mechanisms to deal with the social and economic ills of the metropolitan areas. Nor is the past record of state agencies in the environmental field any more reassuring.

☐ State control over "critical areas" would weaken localities' financial solvency. Certain categories of state concern could cover substantial portions of a municipality's land area. If a state decided to limit development in that area, it could also limit a local government's power to tax the land and raise revenues. Or, if a local government wanted to refuse a large development on the grounds that it couldn't pay the public service costs generated by the development, the state could force the local government to accept the development. (On the other hand, it can be argued that allowing some communities to exclude development indiscriminately will lead to severe overcrowding of housing and facilities elsewhere.)

☐ Out of a desire to reduce hostility to new legislation, states often institute new state controls by duplicating—and leaving untouched—the local apparatus. This political solution carries a high price tag, however: most state systems lack a mechanism for continuing local participation, and consumers and taxpayers pay the bill for a dual system. Costs would go down if state and local zoning regulations were merged into a single system with specific roles for each level.

☐ Some localities are far ahead of states in facing their land use problems and exercising innovative controls. Ramapo, New York has enacted a "timed development ordinance," which permits development only where adequate public facilities exist. At the same time, the town committed itself to an 18-year public improvements program. Fairfax County, Virginia has received wide publicity for its proposed PLUS program (Planning and Land Use System), a coordinated guidance system using a timed development ordinance, a comprehensive county plan, environmental impact statements, and a public facilities construction program. State control might override such strict local standards in favor of weaker state

standards. (On the other hand, it has been argued that such controls will force neighboring communities to be overwhelmed by an influx of people who are unable to live in Ramapo and Fairfax County.)

A state-local partnership?

It has been suggested that local governments would favor a shared local-state regulatory system if local governments could help design the system. The National League of Cities' U.S. Conference of Mayors did just that. It proposed that each higher level of government be allowed to represent its broader constituency without usurping power needed at the local level for responsible decision making.

The proposal would require local elected officials to have a major role in formulating statewide land use planning goals. Local governments could develop their own responsible land use plans within the context of the statewide goals. Localities suffering revenue losses because of land use planning decisions would get state technical assistance and compensation. If a local government had a land use program consistent with state plans and standards, the states could not duplicate or preempt local governmental authority. (28)

Local officials generally agree that weak planning and implementation by localities should be improved with state help. They admit that many local governments need to develop their capacity to approach and solve land use problems. However, they oppose a state bureaucracy preempting authority and perhaps destroying much of what has been accomplished in local planning and regulation. They wish to be allowed, with state assistance and within the framework of acceptable state criteria and standards, to work out pressing and critical land use issues at the traditional local level of government. Localities would prefer states to set minimum standards and criteria for localities to meet, encouraging stricter local standards if a community wants them but not voiding more stringent

local controls. Of course, states might have to override localities in clearly exclusionary cases.

Regional alternatives

A possible alternative to state land use control would be state encouragement of sub-state regional land use bodies, acting under the guidance of the state.

With the proliferation of general-purpose local governments (38,000 in 1970) and with special-purpose districts multiplying apace (22,000), increasing emphasis has been placed on the need for a fourth, regional tier of government. The need for a vehicle to balance area-wide benefits and costs, for rational planning and decision making, and for the efficient supply of public services is particularly acute in metropolitan areas: virtually none of the 200-odd metropolitan areas defined by the Census Bureau is governed by a single all-purpose authority. Rather, decisions with metropolitan impact are made on a piecemeal basis by over 22,000 local governments in these 200 metro areas not to mention innumerable ad hoc and special districts. (29)

Is it possible to fit regional decisions into a political system which is not organized along regional lines? The state may be able to spur development of effective regional government. A number of proposals to strengthen state and local ties through regional agencies have been advanced: the ALI model code proposed regional planning bodies as arms of a state land planning agency. Such entities would oversee land use of more than local impact and interpret local and state needs to each other. The state, however, would be held accountable for the effectiveness of regional planning.

The Advisory Commission on Intergovernmental Relations recently recommended that states establish non-overlapping regions throughout each state. Each region would be headed by a council with

☐ state and local representatives,

☐ controlling powers over special districts, and

☐ authority to review state projects.

At the same time, the governor could veto any council actions in conflict with state policies. If a majority of the local governments concurred, certain services, such as planning, could be performed by the regional council. (30)

What regional arrangements have been tried? Regional councils of government (COGs) have been encouraged by the federal A-95 Review Process which requires that certain requests for federal loans and grants be reviewed by a regional planning body, with a possible denial of funds by the federal agency or the U.S. Office of Management and Budget upon receipt of a negative report. Today some 600 COGs (which are voluntary and advisory only), aided partly by federal funds, bring local officials together to discuss, study, and recommend solutions to regional problems. In addition, some states have established planning regions for administrative efficiency and economic development.

Although few regional bodies now possess power to tax and regulate, some local and regional officials favor strengthening the capacity of regional agencies rather than that of state government. They say that local officials can be more directly involved in the decision-making process at the regional level and have greater understanding of the problems than the distant state level.

Here and there, governmental bodies have achieved a measure of control over regional decisions. Regional government has been created in a few metro areas by consolidation or by annexation. Another route to regional decision making is a two-tier solution: consolidating greater-than-local functions into a metropolitan level, with a second tier of local units to control problems of community or neighborhood scope. Metropolitan Toronto is often cited as an example. The metro government has jurisdiction over such functions as master land use plan-

ning, water service, transportation, and property tax assessment, while local units control or share such functions as zoning (according to the regional plan) and fire protection. However, in the U.S., strong local governments, accountable to an electorate and with traditions and turfs to protect, have to date favored *advisory* regional bodies over true regional governance.

As one observer points out, "Statutory planning agencies and COGs can propose to their hearts' content, but it remains for the *state* highway department or the suburban municipality to dispose. . . ." (31) Dependent on persuasion, the advisory COGs lack power to implement tough decisions on low-income housing, mass transportation, and environmental protection. Participation by citizens—particularly minority groups—has been largely overlooked by COGs: in 1970, only 30% of COG policy boards had minority group members and only 60% had citizen participation of any type.

However, effective regional arrangements can be created and encouraged by the states, which possess the inherent powers to tax, legislate and administer. For example, the state of Minnesota empowered the Metropolitan Council of the seven-county Twin Cities area to define regional functions, with the concurrence of the state legislature. The Twin Cities council currently has powers to control development plans of certain key public facilities and special purpose agencies. Council decisions can be appealed to the state legislature. In addition, the council has also instituted a unique tax-sharing system: 40% of property tax revenues from new commercial or industrial growth must be shared regionally.

In point of fact, the state may be the best hope for metropolitan and regional reform. (32)

The federal role

Today, federal activities (including loans, grants, and projects) have a significant influence on land use pat-

terns. Over 23 federal departments and agencies administer some 112 programs relating to land use. Until very recently, the federal government has done little to coordinate these potentially conflicting programs. The most significant federal activities affecting land use include the highway, airport, and mass transit programs, the sewer and water grant programs, open space funding, agricultural subsidies, planning assistance, the location of major federal facilities, and water resource projects. (Although the complex problem of publicly owned lands is beyond the scope of this publication, the federal government directly owns and manages a third of the nation's land.)(33)

Other federal laws have also greatly influenced land decisions by individuals and by private enterprise. For example, when the U.S. government taxes increases in land value as a capital gain at rates lower than ordinary income, it encourages land speculation; when it allows a landlord to treat depreciation on investment in rental properties as a tax deduction, it encourages inner-city deterioration.

Recent federal laws require state review of the environmental impact of land use plans and projects. The Clean Air Act Amendments of 1970 have been interpreted to require regulation of complex sources of air pollution (shopping centers, sports facilities, parking lots and garages, large residential developments, and highways, for example) and promulgation of state plans to prevent "significant deterioration" in an air quality region. The Federal Water Pollution Control Act Amendments of 1972 also require that development of *point* sources of pollution (such as sewage treatment facilities and industries) and *nonpoint* sources of pollution (such as construction and agriculture) be related to overall land use planning, with consideration of regional impacts. The Coastal Zone Management Act of 1972 set up in the Department of Commerce a direct grant-in-aid program to encourage

states to plan and manage their coastal lands and waters. Eventually, each state will have to carefully coordinate its air, water, and coastal zone programs with overall state land use planning.

Incentives v. penalties

S. 268 assumes that the states are the proper vehicle for instituting land regulation programs and would encourage states to assume this role through the incentive of federal funding. Some believe that incentives are not enough, that penalties must be imposed on states that fail to develop a land use program. Imposing such a penalty as a reduction in highway, airport, or land and water conservation funds, would also decelerate programs with major land use impact.

Procedural review?

The proposed legislation also limits the federal role to review of state land use *procedures*, or mechanisms and methods, rather than the *substance*, or standards and criteria, of state decisions. For example, these questions would be left to the discretion of each state: Should a state define a large-scale development to include a subdivision of 20 units or 200? Should a state exercise its zoning powers directly or establish guidelines for localities to implement? Federal requirements would be flexible, allowing states to determine their degree of control.

National policies and substantive review?

All these federal roles, existent or proposed, fall short of what some see as the preeminent responsibility: *to specify national goals and to develop guidelines which define the state's role and establish consistent substantive standards for all states to follow.* Those who favor the federal government's providing a stronger leadership suggest that, at a minimum, matters of national concern such as national security, housing, or environmental protection could be frustrated by conflicting state policies. They

believe that, just as some land use issues require state action, some land areas and activities require national action—to protect a unique estuary, for example.

They further argue that to encourage the development of fifty separate state land use plans could result in interstate conflicts that could frustrate national interests for effective land management. Many land use issues spill over state boundaries. Large-scale developments affect growth patterns in adjoining states. Economic depression in one state will cause migration to more prosperous states. Many metropolitan areas cross state lines. For instance, the New York City metropolitan region crosses three states, and extraordinary measures are needed to deal with three states' competition for tax revenues, as well as exclusion of low-income persons and resolution of environmental problems.

Senator Muskie (D-Me.) suggested that national criteria be developed to judge whether or not a state has met certain minimum standards of sound land management in the categories of floodplain management, preservation of agricultural land and wetlands, open space, utility-rights-of-way, and provision for adequate power, water, solid waste and transportation systems. Minimum standards for public participation have also been suggested and considered by Congress. But those who recommend national guidelines are by no means in agreement. For instance, energy producers recommend siting of power plants and transmission lines as a national priority. Mining companies see the location and development of natural resources as imperative; farmers stress production of food supplies, and so forth.

Federal coordination?

Far greater agreement exists on the recommendation that the federal government put its own house in order and coordinate its many conflicting programs, plans, and

projects. S. 268 would require federal programs to be consistent with approved state land use programs. Others want stronger measures, including an overall planning office in the Executive Office.

Others go further and suggest that land use planning is only one facet of a broader planning program which the federal government should initiate. They envisage a national growth policy which would guide and coordinate development, population control, housing distribution, the use of natural resources, environmental protection, and the location of government and private development. One of the basic difficulties, however, is in defining the character and extent of federal interest. It would be difficult, some say, to draft national policies and specific criteria to apply fairly across the board to rural and urban states.

A minimal federal role?

At the opposite pole, others see any federal role in land use as an *unconstitutional preemption of the state's inherent power to regulate land use*, as well as an invasion of private property rights. They believe that the federal role should not include participation in land use planning at state levels, however indirect or procedural. They want to delete federal requirements for an "adequate" state planning process and for implementation of plans. They reason that if we are to have land use planning legislation, it should only do what it professes to do and no more. A U.S. Chamber of Commerce report declared that the fundamental issue is whether there should be "sweeping" federal intervention in state and local matters. If private property rights are restricted, the argument runs, our needs for economic development, energy, natural resources, food and housing will be ignored.

European experience

Other nations with a less powerful tradition of local autonomy have exercised strong national control of land

use. Since World War II, European countries have had comprehensive national planning, national growth policies, and strong land use regulation. National policies have been pursued to regulate the distribution of industry, population, employment, and agricultural land. Although our traditions, structure of government, and geographic size are different, some say that a look at European practices and results may be instructive.

In Great Britain, strict national controls over land use and development, a different interpretation of private property rights, and substantial public construction and land ownership have produced a tidy, compact pattern of urban growth along with preservation of the rural environment. Dr. Marion Clawson has observed the advantages of the British system: a halt to chaotic suburban sprawl, more intensive and efficient use of land and public services, a relatively high rate of housing construction (over half public), a network of self-sufficient new towns.

On the other hand, stricter British land use policies, without price controls, have caused a rapid rise in land prices, a monopoly of a few land owners on development, and ultimately, a heavier burden in land and housing costs for the average citizen. In addition, the British concept of planning as primarily an executive function has meant limited opportunities for public participation in the day-to-day process of planning.

France, to cite another example, has pursued an overall national development strategy based upon encouraging growth centers or "equilibrium metropolises" through selective funding and construction. (34)

The emerging role

At present, the emerging U.S. role in land use decisions appears limited to that of a catalyst which supplies incentives and funding to states. Whether or not this is a sufficient role for Congress to assign to the federal level, it

is all that Congress appears willing to do at this time.

It is generally acknowledged that it would be hard to formulate concise national land use policies at this juncture; most agree that improvement in the machinery of government to regulate land use is needed first. As a first step, Congress has considered (in S. 268) provisions requiring the Council on Environmental Quality to report within three years on the desirability of national land use policies or standards. CEQ would be called upon to recommend national *land use* policies (many of which have implications for any future national *growth* policy) that would:

- (1) consider economic, social, and environmental demands upon the land;
- (2) give preference to the long-term interests of the people of the state and nation and ensure public participation in determining those interests;
- (3) protect the quality of the environment and provide access to environmental amenities for all persons;
- (4) encourage a diversity of environments, including man-made and natural environments;
- (5) protect open space for public use and guide urban growth;
- (6) give preference to development which is most consistent with control of air, water, noise, and other pollution;
- (7) provide urban services, including education; water, sewer, and solid waste facilities; transportation; and police and fire protection;
- (8) ensure timely siting of development, to meet national or regional social or economic requirements;
- (9) encourage the conservation and wise use of energy and other natural resources;
- (10) preserve renewable resource land;
- (11) preserve and protect fragile and historic lands;

(12) protect natural hazard lands.

Because a consensus on the possible substance of national land use policies does not now exist, it is thought by many that a prior requisite exists, for better understanding of land areas and activities of national concern, of national priorities, and of administration costs.

The citizen's role

No governmental land use program can succeed without a strong citizen role. It is the citizen who is ultimately affected by land use decisions; who elects the responsible leaders, who supports the legislation, administration, and enforcement, and who pays the bills. Because land use decisions involve weighing and balancing values, not merely making technical decisions, the citizen has a right and obligation to make his or her views known. Citizens without a direct profit interest need to be heard.

The press for stronger land planning and control can often be traced to citizen organization, education and support. For instance, citizens in Vermont mounted a statewide effort to increase public awareness and participation in a state land use program, through task forces, questionnaires, public hearings and meetings, brochures and pamphlets, mass mailings, and television documentaries. By urging a strong state role, citizens helped to shape the state land use legislation finally enacted. In 1972, the voters of California enacted an initiative measure, a state Coastal Zone Conservation Act, which established state regulation over the entire coastline. In both states, citizens—unsalaried members of the general public—serve on land use commissions which administer those states' programs. Citizens throughout the country have also made it known that they support strengthened local and regional capacity to plan and regulate land use.

It is particularly important that citizens participate actively when land use authority is exercised by higher

levels of government. Greater communication and transportation costs tend to inhibit this citizen participation, when land use powers are exercised at the state or regional level of government. On the other hand, if governmental roles are realigned to assign authority to the level of government which most nearly represents all the people affected by a decision, then citizens who might otherwise be excluded can have a voice. For example, the siting of a proposed power plant could affect the economic, social, and environmental requirements of an entire region; yet without a mechanism for more-than-local decision making, only those living within the boundaries of a single community could speak, pro or con.

Following the pattern established by federal air and water pollution legislation, S. 268 would build in a citizen role. It would *require* participation by the public in federal and state land use programs. Among specific state requirements, states would be mandated to prepare an inventory of citizen public interest organizations; to exchange information and data with the public; to establish a process for public education; to assure public participation in the development, revision, implementation and formulation of the state planning program; and to include public hearings with adequate public notice. At the federal level, the administration of a grant-in-aid program for state planning must include public hearings, with adequate public notice, on proposed guidelines, rules, and regulations. In addition, information on studies, methods, federal and state plans and programs must be accessible to the public.

What can government do, at any level, to encourage the citizen to fill his or her role in land use decisions? Throughout the entire planning and regulatory process, government should consult the citizen. For example, government could

- ☐ include citizens in the earliest planning processes and evaluation of goals and methods before plans and decisions are "cast in concrete," through wide publicity, hearings, task forces, committees, meetings;
- ☐ use citizens to gather and assemble data, especially during preparation of inventories and surveys;
- ☐ consult citizens on what they want in enabling legislation and administrative structures to implement the legislation; and
- ☐ inform and notify citizens of choices and alternatives in understandable terms.

What can the citizen do? Citizens could watch carefully and voice their opinions about which areas and activities of critical concern should be subject to control and by what level of government;

- ☐ influence the choice of implementation methods that states and localities use;
- ☐ seek public hearings—with adequate notice—as part of state and local land use decisions, including appeal board decisions, followed by a full public report on the basis for the decision;
- ☐ insist on access to all available data, information, and agency reports that will help people to assess state, regional and local decisions;
- ☐ spot violations of land use control laws and supplement enforcement actions;
- ☐ insist that public decision makers be accessible and responsive to the public;
- ☐ appeal decisions through administrative and judicial routes if necessary;

Last, but not least, if citizens want stronger land use control, they must be willing to pay the costs involved. Governments will incur direct costs for planning, administration, enforcement, and public participation.

Knowledgeable staff, publicity, research programs, meeting facilities, transportation, equipment and supplies all are expensive. Citizens must also be willing to accept indirect costs. If developers must pay higher costs as a consequence of more stringent land use standards, the costs as well as the benefits will ultimately be the consumer's.

Conclusion

A wide range of choices is open to the federal government, states, and localities as they respond to land use problems and issues. The solutions ultimately reached will depend upon political realities and the urgency that citizens assign to land use reform. Finding the solution will involve sorting out alternative approaches to land use control. At this moment, the major land use issue is: *which level of government should exercise what controls over which kinds of development and land areas.*

The proposed federal legislation gives states wide latitude in designing land use programs. Some states are already reasserting their inherent rights to control land use, particularly in reviewing decisions having regional or statewide impacts. A growing number of local governments are questioning the benefits of growth and imposing timed development ordinances and other controls. These decisions, perhaps justifiable in themselves, continue to be made within a land use ethic that says responsibility begins and ends at the local boundary line.

New governmental approaches to land use stem from the consequences of rapid urbanization and population distribution, from recognition of the environmental and social impacts of land use decisions, and from a reappraisal of the meaning of private rights in land versus the public good. How to safeguard the rights of all, including those of the poor and of minorities, remains a serious question, as does the issue of protecting private

property rights. Equitable solutions must be found.

Discussion of the following issues is basic to any rearrangement and strengthening of government's role:

☐ Is ownership of land purely a private matter or does land use imply social obligations? Is there a need to control or limit private property rights in land? If so, how can an equitable balance between the public good and private rights be reached?

☐ Should the U.S. Constitution's Fifth Amendment be interpreted more broadly so as to allow firmer use of governmental regulation (police power) without compensation?

☐ What provisions should be made for assuring that in the future, land use decisions will give due consideration to the needs of the poor, the young, the elderly and minorities?

☐ What should the state role be? Should it directly regulate areas of state concern? Or, in matters of regional and statewide concern, should the local level of government be allowed to keep the authority to make land use decisions, providing they are consistent with state or federal standards and guidelines? Should regional bodies have direct control over certain land use decisions or have only advisory functions? What uses and what areas have local, regional, state, or national impact? What development should be regulated? What goals and standards should be set and how?

What should the federal role in land use planning and control be? Is a federal program necessary to encourage state planning? Should the federal government establish national criteria for state land use programs? If so, in what categories? How strong should they be? Is direct federal control of critical areas and uses of nationwide concern—for example, coastlands, power plants, renewable resource lands—necessary? Should the federal government

use the carrot or the stick to get state and local compliance? Is federal technical assistance needed?

☐ How can government, at whatever level, be made open, responsive and accountable to citizens as it regulates land use?

☐ Are you, as a citizen, willing to pay the costs necessary to administer and enforce land use planning and control?

Because economic, environmental, and social needs and values, with varying levels of public interest, are implicit in land use decisions, the citizen's role is particularly important. All those affected by land use decisions must have the opportunity to participate in the decision-making process and to monitor and review their implementation. It is the citizen who should ultimately decide when the public interest transcends private property rights, whom land use decisions should serve, what kinds of development and land use should be controlled, who should control them, and how much the public will pay for planning and control.

Sources and resources

Some of the items listed can be obtained free. Others will be available in your local library. Your librarian may be able to order others for your use on interlibrary loan. Also consult your library's catalog and its *Readers Guide to Periodical Literature*. Materials listed as printed by USGPO can be ordered prepaid from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Allow up to 6 weeks for delivery. While supplies last, free copies of congressional bills and reports are available from your congressman or the committee involved: Senate Committee on Interior and Insular Affairs, Washington, D.C. 20510 or House Committee on Interior and Insular Affairs, Washington, D.C. 20515. If you can purchase only a few publications, the starred ones (★) are especially recommended.

Books and pamphlets

American Law Institute. A MODEL LAND DEVELOPMENT CODE: Tentative Drafts No. 3. 1971. 123 pp. (paper) \$10. American Law Institute, 4025 Chestnut Street, Philadelphia, PA. Proposed enabling legislation for state control of land use and development, with local implementation.

★Clawson, Marion. AMERICA'S LAND AND ITS USES. 1972. 166 pp. (paper) \$2.75. Johns Hopkins University Press for Resources for the Future, Inc.,

Baltimore, MD 21218. Compact nontechnical account of the nation's land and its uses—history, present trends, future possibilities.

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Mogulof, Melvin B. **FIVE METROPOLITAN GOVERNMENTS**. 1973. 145 pp. (paper) \$3.00. The Urban Institute, 2100 M St., N.W., Washington, D.C. 20037. Looks at alternate governing forms for the metropolis and possible state and federal role.

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Myers, Phyllis. **SO GOES VERMONT**. Feb., 1974. 37 pp. (paper) \$1. Publications Dept., The Conservation Foundation, 1717 Mass. Ave., N.W., Wash., D.C. 20036. An account of the development, passage, and implementation of state land use legislation in Vermont.

★Task Force on Land Use and Urban Growth. **THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH**. 1973. 318 pp. (paper) Thomas Y. Crowell Co., Dept. T-4, 666 Fifth Ave., N.Y., NY 10019. Enclose check payable to publisher: include applicable sales tax. 1-4 copies, @ \$3.95; 5-9, @ \$3.16; 10-24, @ \$3.00; 25-49, @ \$2.84; 50-99, @ \$2.69; 100-249, @ \$2.53; 250-499, @ \$2.37. Special discount on orders over 500. Gives a good view of trends and what steps might be taken to preserve what we value.

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★Bosselman, Fred and David Callies. **THE QUIET REVOLUTION IN LAND USE CONTROL**. Dec. 1971. Full report, 200 pp. (paper) \$2.75. Summary: 34 pp. 45¢. USGPO. Stock #4111-0006. Report prepared for the Council on Environmental Quality on innovative state land use laws.

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